

Short test preview

There will be a short test during our class session on Wednesday, February 13. You will be given five passages from the reading. You will be asked to do the following for *three* of them:

1. *Identify* the author.
2. *Describe* what the author was doing. This usually involves choosing an appropriate verb phrase such as: raising an objection, summarizing a position, stating a principle, posing a question, giving an example, and so on. It also requires *explaining* how the passage does what you say it does: how it raises, summarizes, states, poses, gives and so on.
3. *Evaluate* the passage's significance. Why does it matter for the author's position? For instance, a passage may be significant because of its relationship with other claims that the author makes. Or it may give rise to an objection to the author's position. Or it may explain why the author's position is superior to an opponent's.

You should plan on writing between three and four paragraphs on each passage. Each answer should take about twenty minutes.

Here is an example of how to do this. Suppose I gave you the following passage.

“taken with the meaning wherein I here understand it, the term *superiority* signifies *might*: the power of affecting others with evil or pain, and of forcing them, through fear of that evil, to fashion their conduct to one's wishes.”

The author is John Austin (p. 61, for what it's worth). Austin is *defining* the term “superiority” in terms of the ability to hurt others. Austin did not mean that this is all that the term means in ordinary speech. Rather, his definition spells out the meaning he used in his theory of law. Austin defined laws as commands given by superiors to inferiors. This definition sharpens that one. It specifies that the “superiors” in question have to be able to back up their commands with threats.

Austin subsequently specified which superiors could make laws with his definition of sovereignty.

The definition leads naturally to Austin's claim that legal obligations consist in threatened sanctions. Austin wanted to avoid ambiguity in his legal theory as much as possible. Since the ability to inflict harm on others can be observed, he thought it was a useful way to define the otherwise obscure term "obligation."

Hart criticized Austin's definition on the grounds that it would treat the gunman's threat of 'your money or your life' as generating an obligation to hand over your money. This is not the normal meaning of "obligation." There would be nothing wrong with failing to pay the gunman if, say, he dropped his gun. Could Austin reply that this just shows that obligations last only as long as threats do? That is another inappropriate consequence of Austin's definition. Normally, obligations apply even when we can get away with breaking them. Finally, Hart pointed out that there are a number of laws that do not involve sanctions at all. The laws that enable us to do things such as make a contract, get married, or elect a representative do not come with threatened sanctions for failing to comply. Since they are laws too, Austin's theory is, at best, incomplete.

Both Hart and Austin were legal positivists; they both insisted on the distinction between law and morality. But Hart's objection to Austin sounds as though it relies on ideas about moral obligation. If so, that would conflict with his stated positivism. Hart believed that rules were the primary source of obligations. Moral rules generate moral obligations while legal rules generate legal obligations. Austin might have thought that this amounts to a return to obscurity. But Hart believed that we understand the phenomena surrounding rules well enough for his theory that the law consists in rules to be both clear and illuminating.